



998641

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff,)	
)	
-vs-)	Civil Action No.
)	
CERRO COPPER PRODUCTS CO.,)	
)	
Defendant.)	

CONSENT DECREE

WHEREAS, Neil F. Hartigan, Attorney General of the State of Illinois, on behalf of the People of the State of Illinois and the Illinois Environmental Protection Agency (collectively referred to as plaintiff) filed a complaint against Cerro Copper Products Co. ("Cerro") under sections 104, 107, 113 and 121 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9604, 9607(a), 9613 and 9621, and the Illinois Environmental Protection Act (the "State Act", Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001, et seq.) and regulations promulgated thereunder, and common law nuisance, seeking injunctive relief regarding the cleanup of an area known as Dead Creek Segment A, located in Sauget, Illinois;

WHEREAS, Cerro is the current owner of the property on which Dead Creek Segment A is located;

WHEREAS, plaintiff retained Ecology and Environment Inc. to conduct a preliminary assessment with sampling and analysis in the Sauget area, including in the vicinity of Dead Creek Segment A;

WHEREAS, Cerro voluntarily conducted a focused Remedial Investigation/Feasibility Study (RI/FS) for Dead Creek Segment A,

employing the Avendt Group as its consultant/contractor for that work;

WHEREAS, Cerro has voluntarily undertaken to erect security fencing around Dead Creek Segment A and to institute drainage controls to prevent run-off and backflow from entering Dead Creek Segment A as removal actions as defined in section 101(23) of CERCLA (42 U.S.C. 9601(23));

WHEREAS, the plaintiff has reviewed the RI/FS and has found that it was conducted consistently with the CERCLA National Contingency Plan, 40 CFR 300.68 ("NCP") and the Illinois Hazardous Substances Contingency Plan, 35 Ill. Adm. Code Part 750 ("IHSCP");

WHEREAS, Cerro has agreed to conduct the removal action recommended in the RI/FS;

WHEREAS, Cerro has prepared a Removal Action Work Plan ("RAWP") for Dead Creek Segment A, which RAWP has been reviewed and approved by the plaintiff as consistent with the requirements of CERCLA, the State Act, the NCP, the IHSCP and the RI/FS.

WHEREAS, it is in the public interest to amicably resolve this litigation,

NOW THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

I. JURISDICTION

1. This court has jurisdiction over the subject matter of this action and any pendent claims under sections 104, 107, 113(b) and 121 of CERCLA (42 U.S.C. 9604, 9607, 9613(b) and 9621) and 28 U.S.C. 1331, and has jurisdiction over the parties hereto.

II. PUBLIC INTEREST

2. The parties agree and the court finds that entry of this consent decree is in the public interest, will minimize litigation, and will result in the expedited cleanup of Dead Creek Segment A.

III. OBJECTIVES

3. The purposes of the parties entering into this consent decree is to:

- (a) authorize Cerro to implement the removal action recommended in the RI/FS concerning Dead Creek Segment A;
- (b) document plaintiff's approval of the removal actions that Cerro has performed and proposed to perform concerning Dead Creek Segment A; and
- (c) provide Cerro with a covenant not to sue and contribution protection from others concerning claims relating to Dead Creek Segment A.

The work conducted by Cerro pursuant to this consent decree is subject to the plaintiff's approval as provided herein; it shall be conducted in accordance with sound scientific, engineering and construction practices, and it shall be consistent with the NCP, CERCLA (42 U.S.C. 9601, et seq.), the IHSCP, and the State Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001, et seq.), as amended.

IV. PARTIES BOUND

4. A) This consent decree shall apply to and be binding upon the parties to this action and upon their officers, agents, contractors, employees, successors and assigns. Cerro

shall give notice of this consent decree to each of its successors in interest prior to the transfer of its real property located in Sauget, Illinois, and shall contemporaneously verify to the plaintiff that such notice has been given. No change in ownership, corporate, or partnership status shall in any way alter the status or responsibility of Cerro under this consent decree. Cerro shall remain responsible for carrying out all actions required by the terms and conditions of this consent decree.

B) Cerro shall also be responsible for ensuring that all contractors, consultants, firms and other persons or entities acting under or for it with respect to matters included herein comply with the terms of this consent decree. Cerro shall not raise as a defense to any action to enforce this consent decree the failure of any of its agents, officers, servants or employees to take such action as shall be required to comply with the provisions of this consent decree.

V. WORK TO BE PERFORMED

5. A) Within forty-five days of the entry of the consent decree, Cerro shall submit to the plaintiff for its review and approval a final Health and Safety Plan (HSP) and Quality Assurance Project Plan (QAPP). Upon approval by the plaintiff, the final HSP and QAPP will supersede the QAPP in the RI/FS and shall be deemed part of this consent decree.

B) Within thirty days of the entry of this consent decree, Cerro shall commence performance of the removal action in accordance with the Statement of Work and RAWP, which are attached hereto as Appendix I, and the RI/FS, which is attached

hereto as Appendix II, both of which are incorporated herein by reference, and the final HSP and QAPP. Compliance with the provisions of the RAWP and the RI/FS shall be considered compliance with this consent decree. In addition, Cerro shall assume any and all liability arising from or relating to its acts or omissions in the performance of the work or its failure to perform fully or complete the work required by this consent decree.

C) Beginning on the effective date of this consent decree and continuing until the work is completed, Cerro shall be responsible for remediating any release or threatened release of hazardous substances at or from Dead Creek Segment A arising from the performance of work and Cerro shall maintain adequate freeboard (minimum 2 feet) between the water level of Dead Creek Segment A and the top of its banks.

D) All work that Cerro shall perform under this consent decree shall be under the direction and supervision of a qualified professional engineer or certified geologist that Cerro shall designate as "Project Coordinator." Cerro shall notify plaintiff, in writing, of the name, title and qualifications of the Project Coordinator proposed to be used in carrying out work under this consent decree. If at any time thereafter Cerro proposes to change the Project Coordinator, Cerro shall give such notice to the plaintiff and shall obtain approval from the plaintiff as provided by this consent decree.

E) If the plaintiff disapproves of any Project Coordinator proposed by Cerro pursuant to paragraph D of this Section, Cerro shall submit to the plaintiff a list of proposed

Project Coordinators that the plaintiff would deem acceptable within thirty days of receipt of plaintiff's disapproval of the Project Coordinator previously proposed. Cerro may select any plaintiff-approved Project Coordinator from that list and shall notify plaintiff of the name of the contractor selected within twenty-one days of plaintiff's designation of approved Project Coordinators.

VI. PLANS AND REPORTS

6. Cerro shall submit to plaintiff a monthly progress report that describes the actions taken during the previous month toward compliance with this consent decree, by the fifteenth day of every calendar month, starting with the first full calendar month after the effective date of this consent decree. Monthly progress reports shall include a description of work performed on-site, results of any sampling and testing analysis, difficulties encountered, and work anticipated to be performed in the upcoming month. In addition, Cerro shall, at the conclusion of the work, submit a final report describing the removal, providing a cost summary, and certifying that all activities have been undertaken and completed as required in the consent decree.

VII. COMPLETION OF WORK

7. (A) Upon receipt of the final report certifying that the work has been completed in accordance with this consent decree, plaintiff shall have ninety days to review the report and verify that the work is complete and indicate plaintiff's agreement or disagreement as to its satisfactory completion. If the plaintiff determines that the work has not been completed in accordance with the consent decree, the plaintiff shall notify

Cerro in writing as to what should be done to complete the work. If Cerro disagrees with any such determination by the plaintiff, the dispute resolution provisions of this consent decree shall apply.

(B) The provisions of this consent decree shall be satisfied upon receipt by Cerro of written notice from the plaintiff that Cerro has demonstrated that all of the terms of this consent decree have been satisfactorily completed in accordance with the terms of this consent decree.

VIII. DISPUTE RESOLUTION

8. Any dispute that arises with respect to the meaning, application, interpretation, amendment or modification of the terms of this consent decree, any plan or report required thereunder, with respect to any compliance herewith, or any delay hereunder but not including any emergency action taken by the Illinois Environmental Protection Agency pursuant to sections 4(d)(2) and 22.2 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, pars. 1004(d)(2) and 1022.2) shall, in the first instance, be the subject of informal negotiations. If the plaintiff or Cerro cannot resolve the dispute within thirty calendar days, the dispute may be presented to the court for appropriate resolution upon written notice by either party.

IX. RETENTION AND AVAILABILITY OF INFORMATION

9. A) Within ten days of the lodging of the consent decree (or as soon thereafter as they are available), the plaintiff and Cerro shall exchange copies of all technical information about Dead Creek Segment A, including but not limited

to, laboratory reports, test results, analytical data, and analyses of samples previously taken at the site.

B) Cerro shall preserve all records, documents and information relating to the performance of the work at the site and the removal of waste materials from the site, including sampling analyses, chain of custody records, manifests, contracts, trucking logs, bills of lading, receipts, records pertaining to traffic routing, destination of waste materials, and volume and chemical nature of such materials, correspondence, and other documents produced during the work for a period of six years following completion of the work. The plaintiff shall have access to such records during that six years. Cerro further agrees to make available to the plaintiff any employees with knowledge of relevant facts concerning the performance of the work for purposes of investigation, information gathering, or testimony related to the work for a period of six years following completion.

C) Pursuant to applicable federal laws and regulations, (section 104(e) of CERCLA (42 U.S.C. 9604(e)) and 40 CFR Part 2) or applicable State laws or regulations, Cerro may assert a confidentiality claim with respect to any or all of the information requested or submitted pursuant to the terms of this consent decree. Such an assertion must be adequately substantiated when the assertion is made. Analytical data and other information described in section 104(e)(7)(F) of CERCLA (42 U.S.C. 9604(e)(7)(F)) shall not be claimed as confidential by Cerro. Information determined to be confidential by the plaintiff pursuant to applicable federal or State laws and

regulations will be afforded the full protection provided by such laws and regulations. If no confidentiality claim accompanies information when it is submitted to the plaintiff, or if information claimed as confidential is determined by the plaintiff not to be confidential, the information may be made available to the public by the plaintiff.

X. ACCESS

10. A) Authorized representatives of the plaintiff shall be allowed access to Dead Creek Segment A and such other areas where work under this consent decree is being performed or from which it is being supervised or monitored by Cerro for purposes of, including but not limited to: work, reviewing the progress of Cerro in carrying out the terms of this consent decree; conducting such tests, inspections, and sampling as the plaintiff may deem necessary; using a camera, sound recording, or other documentary type equipment; and verifying the data submitted to the plaintiff by Cerro hereunder. Cerro shall permit such authorized representatives to inspect and copy all operating logs and contracts records, files, photographs, documents, and other writings, including all sampling and monitoring data, which pertains to this consent decree. All persons with access to Cerro's facility including Dead Creek Segment A, pursuant to the consent decree shall comply with approved health and safety plans and the General Safety Rules of Cerro as in effect on the effective date of this consent decree.

B) Authorized representatives of the plaintiff shall have access as provided in paragraph 10(A) without prior notification Monday through Friday between the hours of 8:00 a.m.

and 5:00 p.m. upon presentation of appropriate credentials. Access at any other time shall be preceded by reasonable notification, which may be by telephone, to Cerro.

C) At the request of either party, a party taking samples shall provide the requesting party with splits or duplicates of any samples collected pursuant to this consent decree from Cerro's facility, including Dead Creek Segment A. Cerro shall notify the plaintiff not less than ten days in advance of any scheduled sample collection activity. Cerro shall notify plaintiff of any necessary changes in the schedule, such as schedule changes caused by adverse weather, contractor rescheduling, or other causes.

D. Nothing herein shall be construed as restricting the inspection or access authority of the plaintiff under any law or regulation.

XI. COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

11. A) Cerro agrees to undertake and complete the removal action recommended in the RI/FS concerning Dead Creek Segment A and as set forth in the RAWP. In consideration of the actions that Cerro has performed and will perform under this consent decree, except as provided below, plaintiff covenants not to sue Cerro or its officers, directors, employees, or agents with respect to any and all claims available to plaintiff under sections 106 and 107 of CERCLA and section 7003 of RCRA and any and all claims available under state statutes and common law nuisance relating to Dead Creek Segment A. This covenant not to sue does not apply to 1) claims based on the failure of Cerro to meet the requirements of this consent decree, or 2) to claims

that past, present, or future releases of hazardous substances have contaminated groundwater at the site, or 3) to claims that, on the basis of air monitoring to be conducted at the site following the remedial action, there are unacceptable air releases of hazardous substances emanating from Dead Creek Segment A which require further remedial action.

B) Nothing in this consent decree shall constitute or be construed as a release or covenant not to sue regarding any claim or cause of action against any person, firm, trust, joint venture, partnership, corporation or other entity not a signatory to this consent decree for any liability it may have arising out of or relating to Dead Creek Segment A. Plaintiff and Cerro expressly reserve their rights to sue any person other than Cerro or plaintiff in connection with Dead Creek Segment A.

XII. CONTRIBUTION PROTECTION

12. A) Cerro and plaintiff acknowledge and agree that Cerro prior investigation and performance of work by Cerro pursuant to this consent decree represents a good faith settlement and compromise of a disputed claim. This consent decree provides Cerro with contribution protection as provided in section 113(f) of CERCLA (42 U.S.C. 9613(f)), as amended, and section 2 of "An Act in relation to contribution among joint tortfeasors" (Ill. Rev. Stat. 1987, ch. 70, par. 302). Plaintiff expressly reserves its right to sue any person other than Cerro in connection with Dead Creek Segment A.

B) The parties intend that this consent decree will not affect Cerro right under CERCLA section 113(f)(2)(B) (42

U.S.C. 9613(f)(2)(B)) to seek contribution from others who may be liable for costs of remediation of Dead Creek Segment A.

XIII. MISCELLANEOUS PROVISIONS

13. This consent decree may be executed in any number of counterparts, each of which shall be deemed an original but all of which taken together shall constitute one and the same instrument.

14. This consent decree and its attachments represent the entire agreement and understanding between the parties and shall supercede all prior drafts, writings, negotiations, and discussions between the parties.

15. This consent decree is entered into for purposes of settling this action by plaintiff against Cerro and does not constitute an admission of fact, or law, by any of the parties hereto and shall not be used as evidence against the parties in any judicial action, except one to enforce the terms of the consent decree.

XIV. STIPULATED PENALTIES AND COST REIMBURSEMENT

16. A) In the event Cerro fails to comply with any requirements set forth in this consent decree or Attachment I or any plans submitted thereunder, Cerro shall, upon receipt of a notice of violation from the plaintiff identifying such noncompliance, have fifteen (15) days to correct the noncompliance unless excused by force majeure in accordance with Section XV. If the noncompliance is not corrected after fifteen (15) days, Cerro shall pay to the Illinois Environmental Protection Trust Fund, as a stipulated penalty, Five Hundred Dollars (\$500.00) per day of noncompliance until such time as the

requirements are complied with. These stipulated penalties shall be enforceable by the plaintiff, and shall be in addition to and shall not preclude the use of any other remedies or sanctions arising apart from the failure to comply with the consent decree.

B) Any stipulated penalties for which Cerro shall become liable under this consent decree shall be paid by certified check made payable to "Treasurer of the State of Illinois" and noting for deposit in the Illinois Environmental Trust Fund and delivered to the Manager, Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, P.O. Box 19276, Springfield, Illinois 62794-9276.

C) Cerro shall reimburse the plaintiff in the amount of \$26,063.00 for costs incurred by plaintiff through March 31, 1990, by certified check to be paid within thirty (30) days of entry of this consent decree. This check shall be made payable to the "Treasurer of the State of Illinois" and noting for deposit in the Illinois Environmental Protection Trust Fund and shall be delivered to the Manager, Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, P.O. Box 19276, Springfield, Illinois 62794-9276.

D) At the end of each fiscal year, the plaintiff shall submit to Cerro an accounting of all response and oversight costs incurred by the plaintiff with respect to this consent decree. Cerro shall, within thirty (30) calendar days of receipt of such accounting, remit a certified check for the amount of those costs made payable to the State of Illinois Hazardous Waste Fund which shall be delivered to the aforementioned address.

XV. FORCE MAJEURE

17. A) "Force Majeure" for purposes of this consent decree is defined as any event arising from causes entirely beyond the control of Cerro and any entity controlled by Cerro, including its contractors and subcontractors, which delays or prevents the performance of the RAWP or any other obligation under this consent decree. Force majeure shall not include inability of Cerro to pay necessary costs, unanticipated or increased costs or expenses, changed financial circumstances, non-attainment of the requirements of this consent decree, or failure to make reasonable efforts to obtain permits, access, or any other necessary authorizations.

B) When circumstances occur which may delay the proper completion of any phase of the work, Cerro shall, when it first becomes aware of such circumstances, immediately notify the plaintiff's Project Manager by telephone. Within seven (7) days of the date when Cerro first becomes aware of the event which it contends is responsible for the delay, Cerro shall supply to plaintiff in writing the reason(s) for and anticipated duration of such a delay, Cerro's rationale for interpreting such circumstances as being entirely beyond its control (should that be Cerro's claim), the measures taken and to be taken by Cerro to prevent or minimize the delay, and the timetable for implementation of such measures. Such notice shall be accompanied by all available pertinent documentation, including, but not limited to, third party correspondence. Cerro shall use its best efforts to avoid, discover, minimize, and remain

apprised of any circumstances which may delay the completion of any phase of the Work.

C) If Cerro claims and plaintiff agrees that a delay is or was attributable to force majeure, the parties may provide such additional time as may be necessary to allow the completion of the specific phase of Work and/or any succeeding phase of the Work affected by such delay, and limited thereto, with such additional time not to exceed the actual duration of the delay caused by the force majeure.

D) If plaintiff does not agree that the reason for the delay constituted a force majeure, nor that the duration of the delay is or was warranted under the circumstances, Cerro may seek to resolve the dispute according to Section VIII. Cerro shall have the burden of proving by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by circumstances entirely beyond its control, that the amount of additional time requested is necessary to compensate for those circumstances, and that best efforts were exercised to avoid and mitigate the effects of the delay. Should Cerro carry this burden, the delay at issue shall be deemed not to be a violation by Cerro of the affected obligation of this consent decree.

XVI. RESPONSIBILITIES AND AUTHORITY OF
ON-SCENE COORDINATOR

18. A) The plaintiff shall appoint an employee or independent contractor who shall serve as the plaintiff's on-scene observer to oversee day to day implementation of the work and to monitor the performance of Cerro's contractor or consultant.

B) In addition to the person described in paragraph 18, the plaintiff shall also appoint a "Project Manager", who shall be responsible for the management and implementation of the plaintiff's oversight efforts. The plaintiff's Project Manager shall have the authority vested in an on-scene coordinator and a remedial project manager by the National Contingency Plan (40 CFR Part 300), as amended, and the State Contingency Plan (35 Ill. Adm. Code Part 750), as amended, including the authority to halt, monitor, conduct or direct any work required by this consent decree or to direct any response action undertaken by the plaintiff when conditions at the facility may present an imminent and substantial endangerment to the public health or welfare or the environment or in order to prevent a release or threatened release of waste materials at or from the site. If the Project Manager requires suspension of the Work, the Project Manager shall then have the authority to require Cerro to perform the Work in a manner consistent with this consent decree and Attachment I but also in a manner that will avoid or mitigate the threat which the Project Manager believes may occur. Whenever feasible, the Project Manager shall consult with Cerro's Project Coordinators before ordering such suspension of Work. In the event that the Project Manager suspends the Work, the parties shall, with the approval of the court, modify this consent decree to the extent necessary so as to enlarge the schedule for the suspended phase or any succeeding phase by a period of time not to exceed the actual length of the suspension, plus the additional time needed to complete any additional Work necessitated by this suspension. To the maximum extent possible,

communications between Cerro and the plaintiff, and all documents, reports, approvals and other correspondences concerning the activities performed pursuant to the terms and conditions of this consent decree, shall be directed through the project coordinators/managers. During the implementation of the RI/FS Work Plan, the project coordinators/managers shall, whenever possible, operate by consensus and shall attempt in good faith to resolve disputes informally through discussion of the issues. The plaintiff and Cerro shall each have the right to change its respective project manager/coordinators. Such a change shall be accomplished by notifying the other party in writing at least ten (10) calendar days prior to the change.

C. Cerro's Project Coordinator shall notify the plaintiff's Project Manager immediately upon the occurrence of any event which, in Cerro's Project Coordinator's judgment, may threaten human health or the environment. The notice shall be followed by written notification to the plaintiff as provided in Section XVII from Cerro's Project Coordinator within ten days which explains the event, any action taken to eliminate the threat, and the precautions taken to avoid recurrence of a similar threat.

D. The absence of the plaintiff's on-scene observer or Project Manager from the facility shall not be cause for stoppage of work.

XVII. NOTICES

Whenever, under the terms of this consent decree, notice is required to be given or a report or other document is required to be forwarded by one party to another, it shall be directed to

the individuals at the addresses specified below, unless those individuals or their successors give notice in writing to the other parties of another individual designated to receive such communications. Notice to the individuals listed below shall constitute complete satisfaction of any notice requirement of the order with respect to the plaintiff and Cerro, respectively.

As to Cerro

President
Cerro Copper Products Co.
P. O. Box 66800
St. Louis, MO 63166

and

Michael Rodburg
Lowenstein, Sandler, Kohl,
Fisher & Boylan
65 Livingston Avenue
Roseland, NJ 07068-1791

As to the plaintiff:

Illinois Attorney General's
Office, c/o James L. Morgan
Assistant Attorney General
Environmental Control Division
500 South Second Street
Springfield, IL 62706

and

Sauget Sites Project Manager
c/o Paul Takacs
Illinois Environmental
Protection Agency
Land Pollution Control Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

XVIII. COMPLIANCE WITH APPLICABLE LAWS

All work undertaken by Cerro pursuant to this consent decree shall be performed in compliance with all applicable federal and State laws and regulations, including all Occupational Health and Safety Administration and Department of Transportation regulations. Cerro shall be responsible for obtaining all State or local permits which are necessary for the performance of any work hereunder.

XIX. RETENTION OF JURISDICTION

The court shall retain jurisdiction of this matter for the purposes of interpreting, implementing and enforcing the

terms and conditions of this consent decree and for the purpose of adjudicating all matters of dispute between the parties.

ENTERED THIS _____ DAY OF _____, 1990.

JUDGE

Approved as to form:

NEIL F. HARTIGAN
ATTORNEY GENERAL

CERRO COPPER PRODUCTS CO.

BY: Shawn W. Denney
Shawn W. Denney
First Assistant Attorney
General

BY: P. Tandler
P. Tandler, Vice President

FEIN # 36-2943840

DATED: 6-28-90

DATED: 7-2-90

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

BY: Joseph E. Svoboda
Joseph E. Svoboda
General Counsel
Division of Legal Counsel

DATED: 6/28/90

cerrocd/clerk4.evs

REMOVAL ACTION WORK PLAN

For

DEAD CREEK SEGMENT A

CERRO COPPER PRODUCTS CO.

SAUGET, ILLINOIS

APPENDIX I

LAG0264

**SITE INVESTIGATION/
FEASIBILITY STUDY**

FOR

CREEK SEGMENT A

JUNE 1990

VOLUME I

**SITE INVESTIGATION/
FEASIBILITY STUDY**

FOR

CREEK SEGMENT A

JUNE 1990

VOLUME II